Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RUTH L.R. LEVY, GARRY ROEMER, ANTHONY CARLO, GEORGE P. CULLEN, RAYMOND GAST, DESPINA HATZELIS, DONALD LOPES, GERALD T. MAGUIRE, BERNARD RASHES, MICHAEL SAVINO, THOMAS REPASCH, ERNEST ARCIELLO, HARVEY FREELING, JAMES R. BRADLEY, EDWIN B. GRIFFIN, RICHARD SCHLITT, ROBERT G. MURRAY, AMY HUTNER, JOHN PATRICK HARRISON, ALLEN W. GENDLER, RUDOLPH PLESSING and JAMES D. VAN BLARCOM,

Petitioners,

v.

UNITED STATES GENERAL ACCOUNTING OFFICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 15(c)(2) of the Federal Rules of Civil Procedure specifically governs the relation back, for statute of limitations purposes, of an amendment adding *new claims* arising from the same fact occurrence giving rise to the original claim. Rule 15(c)(3) specifically governs the relation back, for statute of limitations purposes, of an amendment adding *new parties against whom claims* arising from the same fact or occurrence giving rise to the original claim are asserted. Neither rule specifically governs the relation back, for statute of limitations purposes, of an amendment adding the *claims of new claimants* arising from the same fact or occurrence giving rise to the original claim.

1. Does Rule 15(c)(2) of the Federal Rules of Civil Procedure apply alone or in conjunction with some or all of Rule 15(c)(3) to an amendment adding a party asserting a claim against a timely served defendant?

LIST OF PARTIES

The following parties were Plaintiffs below and are Petitioners before this Court:

Ruth L. R. Levy, Garry Roemer, Ernest Arciello, James D. Van Blarcom, James R. Bradley, Anthony Carlo, George P. Cullen, Harvey Freeling, Raymond Gast, Allen W. Gendler, Edwin B. Griffin, John Patrick Harrison, Despina Hatzelis, Amy Hutner, Donald Lopes, Gerald T. Maguire, Robert G. Murray, Rudolph Plessing, Bernard Rashes, Thomas Repasch, Richard Schlitt and Michael Savino.[1]

The following party was the Defendant below and is the Respondent before this Court: United States General Accounting Office.

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1. With the exception of Petitioner Levy, the petitioners will be collectively referred to as the "*Roemer* Plaintiffs". The *Roemer* Plaintiffs filed their own lawsuit, 97 Civ. 4488, in addition to joining in the Amended Complaint in 97 Civ. 4016, which was the original action started by Petitioner Levy. Petitioner Levy and the *Roemer* Plaintiffs will be collectively referred to as the "Petitioners."

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Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided April 26, 1999 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Southern District Of New York Dated April 20, 1998 ..... 3a

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 26, 1999, to address an important question as to the scope of Federal Rule of Civil Procedure 15(c) and in order to resolve a conflict between the Second Circuit, on the one hand, and the Fifth Circuit and the Court of Appeals for the Federal Circuit (as successor to the Court of Claims) on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is unpublished. It is reprinted in Appendix A hereto ("App. A") at page 1a.

The opinion of the United States District Court for the Southern District of New York is reported at 1998 WL 193191 (S.D.N.Y. 1998). It is reprinted in Appendix B hereto ("App. B") at page 3a.

STATEMENT OF JURISDICTION

On April 20, 1998 the United States District Court for the Southern District of New York, by the Honorable Michael B. Mukasey, granted the motion of Respondent The United States General Accounting Office (hereinafter referred to as "GAO" or the "Respondent"), pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss the *Roemer* Plaintiffs from these consolidated actions. Review was sought in the United States Court of Appeals for the Second Circuit.

On August 26, 1999, the Second Circuit denied Petitioners' appeal in all respects. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the judgment.

STATUTES INVOLVED

Rule 15(c) of the Federal Rules of Civil Procedure provides, in relevant part:

> (c) **Relation Back of Amendments**. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identify of the proper party, the action would have been brought against the party.

STATEMENT OF THE CASE

On August 7, 1995, the Petitioners were all over 40 years of age and were employed as evaluators in the GAO's New York office. On that date, the Comptroller General announced his decision to close the GAO's New York office and certain other offices of the GAO and terminate all personnel in those offices. On November 10, 1995, the GAO closed the New York office and all personnel then assigned to it were involuntarily separated from their employment with the GAO.

In January, 1996 the Petitioners filed separate, timely administrative charges of unlawful age discrimination with the GAO. On March 6, 1997, the GAO issued a final agency decision denying the Petitioners' claims in their entirety and informed each of the Petitioners by certified mail that if he/she wished to challenge that decision in federal court, he/she was required under the ADEA to file a complaint within 90 days of receipt. The 90 day period expired for all the Petitioners between June 6, 1997, and prior to June 18, 1997.

On June 2, 1997, Levy filed her complaint in federal court on her own, *Levy v. United States General Accounting Office*, 97 Civ. 4016 (MBM) (S.D.N.Y), against the GAO alleging intentional age discrimination under the ADEA. Levy's complaint alleged that the GAO sacrificed her and the other 46 evaluators on the staff of the New York office in order to save the jobs of younger evaluators employed by GAO nationwide in violation of the Age Discrimination in Employment Act ("ADEA"). On June 18, 1997, the *Roemer* Plaintiffs filed a similar complaint in federal court against the Respondent. *Roemer, et al., v. United States General Accounting Office*, 97 Civ. 4488 (S.D.N.Y. filed June 18, 1997).

After consolidating the two actions for discovery, but before the GAO had responded to the *Levy* complaint, the District Court granted Levy's motion to amend her complaint pursuant to Rule 15(a), without prejudice to the GAO's right to challenge Levy's adding the *Roemer* Plaintiffs' claims on the ground that those claims were time-barred.

On September 18, 1997, Levy amended her complaint by adding the Petitioners as co-plaintiffs in her lawsuit and integrating the language of the two complaints. The Respondent then moved to dismiss the *Roemer* Plaintiffs' complaint in its entirety, and to dismiss them from the *Levy* complaint, in each case on the ground that the District Court lacked subject matter jurisdiction over the *Roemer* Plaintiffs' claims pursuant to Rule 12(b)(1).

On April 20, 1998, the District Court granted the Respondent's motion to dismiss. Judgment pursuant to the Court's decision granting the Respondent's motion for summary judgment was entered by the Clerk of the Court on April 30, 1998. In its April 20th decision the District Court also dismissed the claims of the *Roemer* Plaintiffs in *Levy, et al. v. United States General Accounting Office*, 97 Civ. 4016 (MBM). Partial judgment in *Levy* was entered on June 30, 1998, the District Court reasoning that since all the Petitioners raised identical claims of age discrimination and a partial judgment in *Levy* would avoid the possibility of duplicative trials in the event of a reversal by the Court of Appeals. On April 26, 1999, the Second Circuit denied Petitioners' appeal in all respects.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE COURTS BELOW CONFLICTS WITH DECISIONS OF THE FIFTH CIRCUIT AND THE FEDERAL CIRCUIT.

The lack of any express provision in Rule 15(c) with respect to relation back amendments adding plaintiffs, as discussed *post* in Point II, has led to conflicting opinions in the lower courts. Because of the importance of clarity on this issue to the orderly administration of the law, the petition should be granted so that this Court may provide clear guidelines on the question of what rule or standard applies to determine when an amendment adding plaintiffs to a timely filed complaint arising out of the same transaction or occurrence and alleging identical claims relates back to the filing of the original complaint.

The Second Circuit's approach, which was followed in this case, applies Rule 15(c)(3) to require plaintiffs to demonstrate that "but for a mistake concerning the new plaintiff's identify, the action would have been brought on that party's behalf." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 19 (2nd Cir. 1997). *See also Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 35 (2nd Cir. 1996); *Barrow v. Wethersfield Police Dep't*, 74 F.3d 1366, 1367 (2nd Cir. 1996), *modifying*, 66 F.3d 466 (2nd Cir. 1995); *Cornwell v. Robinson*, 23 F.3d 694, 705 (2nd Cir. 1994); *Gleason v. McBride*, 869 F.2d 688, 694 (2nd Cir.

1989).[2] This same construction of Rule 15(c)(3) has also been followed in the Third Circuit. *Nelson v. County of Allegheny*, 60 F.3d 1010, 1014 (3rd Cir. 1995).

The Second and Third Circuit's application of the mistake requirement of Rule 15(c)(3), conflicts with decisions of the First Circuit and the Court of Appeals for the Federal Circuit (formerly the Court of Claims) which permits the relation back of claims of new plaintiffs without regard to the "mistake" language in Rule 15(c)(3)(B). Under the circumstances, certiorari is appropriate here to resolve an important controversy over the proper interpretation of a federal rule of procedure. *See Acosta v. Louisiana Dept. of Health & Human Res.*, 478 U.S. 251, 253 (1966) (Court granted petition to resolve conflicting interpretations of Fed. R. App. P. 4 and affirmed in *per curiam* opinion).

A case well articulating the conflicting view is a decision by the Court of Claims (now the Court of Appeals for the Federal Circuit) in *Snoqualmie Tribe of Indians v. United States*, 372 F.2d 951, 178 Ct. Cl. 570 (1967). This case involved an attempt by one Indian tribe suing the United States for violation of a treaty to amend its complaint to present the claims on behalf of another tribe also affected

2. Most of these cases are distinguishable because they involve relation back amendments to ***add defendants*** who were not already parties to the suit during the limitations period. *See Soto v. Brooklyn Correctional Facility*, 80 F.3d 34 (2nd Cir. 1996); *Barrow v. Wethersfield Police Dep't*, 74 F.3d 1366 (2nd Cir. 1996), *modifying*, 66 F.3d 466 (2nd Cir. 1995); *Cornwell v. Robinson*, 23 F.3d 694 (2nd Cir. 1994); *Gleason v. McBride*, 869 F.2d 688 (2nd Cir. 1989). *Accord, Hernandez Jiminez v. Calero Toledo*, 604 F.2d 99, 103 (1st Cir. 1979). The other cases cited by the courts below contain the same result-oriented conclusion which other courts have justifiably criticized.

by the same violation. The defendant United States argued that the relation back provision of Indian Commission Rule 13(c) — which was substantially identical to Fed. R. Civ. P. 15(c) then in effect — could not be used to overcome a "jurisdictional" statute of limitations and that it did not have adequate notice of the claims. The Court of Claims disagreed on both points, finding that the claims of the original and proposed new plaintiff in that case were "sufficiently closely related to warrant the conclusion that the government received adequate notice of the possibility that it might have to defend against a broader claim." *Id.* at 961. More importantly, the Court in *Snoqualmie* imposed no mistake requirement on the plaintiff in order to permit the filing of an otherwise time barred claim to relate back to the filing of another claim.

The Fifth Circuit applied the conflicting view in *Williams v. United States*, 405 F.2d 234 (5th Cir. 1968). In *Williams*, the Fifth Circuit reversed the district court's denial of the amendment permitting a new plaintiff to be added to a complaint to assert a claim against the Government which otherwise would have been time barred. Without imposing any mistake requirement as the courts below did in the case *sub judice*, the Court held that when a new plaintiff with a new claim that arose out of a common set of operational facts is sought to be added after the statute of limitations has lapsed, "[n]ot only must the adversary have had notice about the operational facts, but it must have had fair notice that a legal claim existed in and was in effect being asserted by, the party belatedly brought in." *Id.*, 405 F.2d at 238.

There appears to have been no mistake as to the identity or nomenclature of either the defendant or the proposed new plaintiff, and there was no discussion in that case that the

proposed new plaintiff had to establish mistake in order to satisfy the court that her claim was timely. The holding in *Williams* was affirmed in *Flores v. Cameron County, Texas*, 92 F.3d 258, 273 (5th Cir. 1996).[3]

The courts below were concerned that permitting the *Roemer* Plaintiffs to proceed with their claims in the *Levy* action would circumvent or expand the limitations period relevant to such claims. However, that this might occur in certain cases does not end the inquiry. *Williams* found the critical inquiry to be not whether there might be some prejudice from permitting the amendment, such as subjecting the Government to a claim it would not otherwise have had to defend against, but whether there was "fair notice that a legal claim existed in and was in effect being asserted by . . . the party belatedly brought in," *Id.*, 405 F.2d at 238, and whether there is an identity between the new and old plaintiffs. While there is no question here whether the GAO had fair notice of the legal claims of the *Roemer* Plaintiffs prior to the expiration of limitations period to bring suit, or whether there was a close identity between the new and old Petitioners herein, the courts below applied the mistake test.[4]

3. There is nothing unique to the fact that an agency of the United States Government is the defendant in this case that contravenes the general principles that favors relation-back amendments to add claims of additional plaintiffs that would otherwise be time-barred, so long as the factors which generally favor such amendments are present. Since the United States Government was already properly before the Court in the *Levy* case, the concerns raised by the courts below that relation back amendments may offend notions of sovereign immunity simply carry no weight.

4. In *Allied Intern. v. Intern. Longshoremen's Ass'n*, 814 F.2d 32, 35 (1st Cir. 1987), *cert. denied*, 484 U.S. 820, 108 S. Ct. 79 (1987) the First Circuit in a slightly different context reached a result

(Cont'd)

Other lower federal courts have permitted amendments adding new parties whose claims would otherwise be time-barred, without requiring the finding of a mistake as the Second Circuit now does. *See, e.g., Neufeld v. Neufeld*, 910 F. Supp. 977, 985-86 (S.D.N.Y. 1996); *Andujar v. Rogowski*, 113 F.R.D. 151, 154-155 (S.D.N.Y. 1986); *Employees Sav. Plan of Mobil Oil Corporation v. Vickery*, 99 F.R.D. 138, 143 (S.D.N.Y. 1983) ("[a]s long as a defendant has received notice of the action, and is prepared to defend against it, 'his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitation defense.' "); *Red Rock Commodities, Ltd., v. M/V Kopalnia Szombierki*, 1994 WL 440822 (S.D.N.Y.

(Cont'd)
contrary to that adopted by the Second Circuit here and permitted the amendment of a complaint substituting a plaintiff into the litigation whose claim was otherwise time-barred. The Court found that, when substituting a fresh plaintiff for the original one, three requirements had to be met to permit the relation back amendment:

> the amended complaint must arise out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading; there must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said to have been given fair notice of the latecomer's claim against them; and undue prejudice must be absent.

Id., 814 F.2d at 35-36. *See also Staren v. American National Bank and Trust Company of Chicago*, 529 F.2d 1257 (7th Cir. 1976).

1994); *Nielsen v. Professional Financial Management, Ltd.*, 682 F. Supp. 429, 435-36 (D. Minn. 1987).[5]

Stoppelman v. Owens, 580 F. Supp. 944 (D.D.C. 1983), for example, involved two limited partners in an oil well equipment investment plan. They sued the general partner one day prior to the expiration of the statute of limitations. After the running of the statute of limitations, they sought to amend their complaint to add as plaintiffs other limited partners who had also invested in the venture. Defendants asserted that Rule 15(c) could not apply to a situation where a plaintiff barred by a statute of limitation attempted to join an action brought by other plaintiffs prior to the running of the limitations period. The Court in *Stoppelman* found that absent some legally cognizable prejudice, the amendment would be allowed. Citing the case of *DeFranco v. United States*, 18 F.R.D. 156 (S.D. Cal. 1955), a tax case, the court concluded that because the addition of the new plaintiffs did not set up a new claim against the defendant (that is, the wrong was the same), and because the defendant was aware and had notice from the beginning that the wrong the original plaintiffs sought to remedy involved a wrong to the proposed plaintiff as well, the amendment and relation back would be

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5. It is true that permitting the *Roemer* Plaintiffs to proceed in the *Levy* case might increase the GAO's financial exposure should the *Roemer* Plaintiffs prevail on their claims. However, the courts are clear that this kind of prejudice is not a legally cognizable prejudice in this context. So long as the original complaint gives defendant adequate notice, an amendment relating back is proper even if it exposes a defendant to greater damages. *Andujar*, 113 F.R.D. at 157; *Soler v. G&U, Inc.*, 103 F.R.D. 69, 74-75 (S.D.N.Y. 1984); *Allied Intern.*, 814 F.2d at 37; *Goldenberg v. World Wide Shippers and Movers*, 236 F.2d 198, 200-01 (7th Cir. 1956); *Paskuly v. Marshall Field & Co.*, 646 F.2d 1210 (7th Cir. 1981).

permitted "even though the applicable statute of limitations had expired." *Stoppelman*, 580 F. Supp. at 946.[6]

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6. The concern with adding new defendants, which is specifically provided for in Rule 15(c), is different than that involving the addition of new plaintiffs to an already timely action. The principle in the former situation is to ensure fairness and prevent surprise to a defendant from institution of a claim that has been dormant for so long that proof, witnesses and memories have disappeared. *Mackensworth v. S.S. Am. Merchant*, 28 F.3d 246, 252 (2nd Cir. 1994); *In re Chaus Sec. Litig.*, 801 F. Supp. 1257, 1264 (S.D.N.Y. 1992). That principle is not transgressed in the circumstances of the case *sub judice*. As numerous courts have stated, where the defendant was on notice of the lawsuit from the original complaint and the addition of other plaintiffs did not bring any new claims into the action, "the purpose behind the statute of limitations, namely notice, is not defeated . . . by permitting the amended complaint to relate back." *Stoppelman*, 580 F. Supp. at 947. *See also In re Integrated Resources Real Estate Securities Litigation*, 815 F. Supp. 620, 644 (S.D.N.Y. 1993).

"As long as a defendant is fully apprised of a claim arising from specific conduct and has prepared to defend the actions against him, he will not be prejudiced by the addition of a new plaintiff and thus should not be allowed to raise a limitations defense." 6 Wright & Miller, § 1501 (1st ed. 1971 & Supp. 1986) (quoted in *Andujar v. Rogowski*, 113 F.R.D. at 155; 3 Moore's Federal Practice, Para. 15.19[1] at 15-79 ("The purpose of the statute of limitations is to prevent stale claims. The rationale for allowing an amendment to relate back is that once a party is notified or litigation involving a specific factual occurrence, the party has received all the notice and protection that the statute of limitations requires."). *See also Siegel v. Converters Transportation, Inc.*, 714 F.2d 213, 216 (2nd Cir. 1983) (rationale of Rule 15 is to "ameliorate the effects of the statute of limitations.").

(Cont'd)

This body of decisional law and commentary conflicts the with approach adopted by the Second Circuit in this case and the Third Circuit. Because a conflict exists between the circuits, certiorari should be granted to settle this issue, an issue which is of vital importance to the administration of the civil laws.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE PROPER SCOPE OF STATUTORY CONSTRUCTION.

The courts below decided that Federal Rule of Civil Procedure 15(c)(3), particularly the mistake requirement found in Rule 15(c)(3)(B), applied to relation back amendments adding new plaintiffs alleging claims identical to those filed in an otherwise timely filed complaint. In so doing, the courts below read into the rule a meaning that is not stated or implied by the plain language of the rule.

Rule 15(c)(3) states clearly that an "amendment of a pleading relates back to the date of the original pleading when . . . the amendment changes the party or the naming of *a party against whom a claim is asserted* . . ." As is clear from the explicit language quoted above, Rule 15(c)(3) applies

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(Cont'd)

All the protections afforded to the Respondent in this case by the statute of limitations was accomplished by the filing of the original *Levy* complaint. The original *Levy* complaint gave the GAO more than adequate notice of the *Roemer* Plaintiffs' claims. The GAO was clearly aware both of the full extent of these claims during the limitations period and of the close relationship between Levy and the *Roemer* Plaintiffs.

only to amendments adding new defendants. The decisions below, which applied Rule 15(c)(3), runs afoul of this Court's often repeated principle that the plain language of a statute should be given its literal meaning.

As this Court has stated, "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992). It is the language of the statute which provides the most reliable evidence of congressional intent" *Bailey v. United States*, 516 U.S. 137, 145 (1995); *Halloway v. United States*, 119 S. Ct. 966, 969 (1999). For this reason, statutory construction always begins with the language of the statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Hughes Aircraft Company v. Jacobson*, 119 S.Ct. 755, 760 (1998). When the words of a statute prove unambiguous, "this first cannon is also the last; judicial inquiry is complete." *Hughes Aircraft Company v. Jacobson*, 119 S. Ct. 755, 760 (1998). *See also Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992).

This rule of statutory construction applies with full force to the Federal Rules of Civil Procedure. As this Court stated, "We give the Federal Rules of Civil Procedure their plain meaning and generally with them as with a statute, when we find the terms unambiguous, judicial inquiry is complete." *Business Guides, Inc. v. Chromatic Communications*, 498 U.S. 533, 540-41 (1990). *See also Pavelic v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989). This Court has been wary to read too much into the Federal Rules of Civil Procedure, avoiding any interpretation which exceeds the actual words of the statute. "We have no power to rewrite the rules by judicial interpretations." *Harris v. Nelson*, 394

U.S. 286, 298 (1968). *See also LandGraf v. USI Film Products*, 511 U.S. 244, 286 (1994).

Rule 15(c)(3) applies to "a party against whom a claim is asserted". As the meaning of these words is both clear and unambiguous, it is presumed that the legislature has "said what it means," *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992), and further judicial inquiry into the meaning of the statute is complete. *Hughes Aircraft Company v. Jacobson*, 119 S. Ct. 755, 760 (1998).

Rule 15(c)(3) provides a specific remedy in a specific situation that does not exist in the case *sub judice*. For a court to read more into Rule 15(c)(3) would overturn Congress' intent. *Meghrig v. KFC Western*, 516 U.S. 479, 488 (1996). Instead, the Supreme Court should follow its own recent precedent in *Business Guides* and *Landgraff* and avoid reading more into 15(c)(3) than what it's plain meaning fairly conveys.

Certiorari should be granted is this case to ratify the precept that the same rules of construction apply to the Federal Rules of Civil Procedure as to other legislation passed by Congress.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED APRIL 26, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: April 9, 1999 Decided: April 26, 1999)

Docket Nos. 98-6147, 98-6173

RUTH L.R. LEVY, GARRY ROEMER, ANTHONY CARLO, GEORGE P. CULLEN, RAYMOND GAST, DESPINA HATZELIS, DONALD LOPES, GERALD T. MAGUIRE, BERNARD RASHES, MICHAEL SAVINO, THOMAS REPASCH, ERNEST ARCIELLO, HARVEY FREELING, JAMES R. BRADLEY, EDWIN B. GRIFFIN, RICHARD SCHLITT, ROBERT G. MURRAY, AMY HUTNER, JOHN PATRICK HARRISON, ALLEN W. GENDLER, RUDOLF PLESSING, and JAMES D. VAN BLARCOM,

Plaintiffs-Appellants,

— v. —

UNITED STATES GENERAL ACCOUNTING OFFICE,

Defendant-Appellee.

Before:

WINTER, *Chief Judge*,
NEWMAN, and SOTOMAYOR, *Circuit Judges.*

* * *

Appendix A

PER CURIAM:

In this consolidated appeal, appellants other than Ruth L.R. Levy (the "Roemer Appellants") appeal from Judge Mukasey's order dismissing their complaint in *Roemer v. United States Gen. Accounting Office*, No. 97 Civ. 4488 (MBM) ("the Roemer Complaint") as time barred. All appellants appeal from the district court's dismissal of the Roemer Appellants as plaintiffs in an amended complaint filed in *Levy v. United States Gen. Accounting Office*, No. 97 Civ. 4016 (MBM) (the "Levy Amended Complaint"), also because their claims were time barred. We affirm for substantially the reasons stated by the district court in its holding with regard to the single filing rule. *See Levy v. United States Gen. Accounting Office*, No. 97 Civ. 4016 (MBM), No. 97 Civ. 4488 (MBM), 1998 WL 193191 (S.D.N.Y. Apr. 22, 1998). We agree that it does not apply because the Roemer Appellants filed timely charges of discrimination with the General Accounting office ("GAO"). They were notified of the GAO's final decision on their claims, and the Roemer Complaint was not filed within ninety days of that final decision. *See id.* at *2-*4. We also agree with the district court, for substantially the reasons it stated, that the claims of the Roemer Appellants in the Levy Amended Complaint do not relate back to Levy's timely complaint. Levy did not seek to add the Roemer Appellants as plaintiffs because of a mistake, as required by Fed. R. Civ. P. 15(c)(3)(B). Rather, Levy sought to add them because the Roemer Appellants had filed a separate complaint that was time barred, *see id.* at *4-*6.

The judgment of the District Court in 97 Civ. 4488, entered May 1, 1998, and the partial judgment of the District Court in 97 Civ. 4016, certified under Fed. R. Civ. P. 54(b), and entered July 7, 1998, are affirmed.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 20, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 4016 (MBM)
97 Civ. 4488 (MBM)

RUTH L.R. LEVY, et al.

Plaintiffs,

– against –

UNITED STATES GENERAL ACCOUNTING OFFICE,

Defendant.

GARRY ROEMER, JAMES D. VAN BLARCOM, ANTHONY CARLO, GEORGE P. CULLEN, RAYMOND GAST, DESPINA HATZELIS, DONALD LOPES, GERALD T. MAGUIRE, BERNARD RASHES, MICHAEL SAVINO, THOMAS REPASCH, ERNEST ARCIELLO, HARVEY FREELING, JAMES R. BRADLEY, EDWIN B. GRIFFIN, RICHARD SCHLITT, ROBERT G. MURRAY, AMY HUTNER, JOHN PATRICK HARRISON, ALLEN W. GENDLER, RUDOLF PLESSING,

Plaintiffs,

– against –

Appendix B

UNITED STATES GENERAL
ACCOUNTING OFFICE,

Defendant.

OPINION AND ORDER

* * *

MICHAEL B. MUKASEY, U.S.D.J.

In this consolidated action, Ruth L. R. Levy and Garry Roemer, *et al.*,[1] sue the United States General Accounting Office ("GAO") for violating the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, *et seq.* (1994). Plaintiffs' claims arise from the closing of the GAO's New York field office in November 1995. Defendant moves to dismiss the Roemer plaintiffs' complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) on the ground that their claims are time-barred. The Roemer plaintiffs argue that their failure to file a complaint within the limitations period may be excused by the "single filing" rule, or alternatively, that their

1. The following parties will be collectively referred to as the "Roemer plaintiffs": Garry Roemer, Ernest Arciello, James D. Van Blarcom, James R. Bradley, Anthony Carlo, George P. Cullen, Harvey Freeling, Raymond Gast, Allen W. Gendler, Edwin B. Griffin, John Patrick Harrison, Despina Hatzelis, Amy Hutner, Donald Lopes, Gerald T. Maguire, Robert G. Murray, Rudolph Plessing, Bernard Rashes, Thomas Repasch, Richard Schlitt, and Michael Savino. The term "plaintiffs" refers to both Levy and the Roemer plaintiffs.

claims are not time-barred because they relate back to Levy's timely complaint under Fed. R. Civ. P. 15(c). For the reasons stated below, defendant's motion is granted, and the Roemer plaintiffs' claims are dismissed.

I.

The following undisputed facts are relevant to defendant's motion: the GAO is a federal agency that investigates the receipt and disbursement of federal funds, and reports its findings to Congress. (Compl. ¶ 31)[2] As of August 1995, plaintiffs, each of whom is over 40 years of age, were employed as evaluators in the GAO's New York office. (*Id.* ¶ 32) In November 1995, the GAO closed that office and eliminated the jobs of all employees working there. (*Id.* ¶ 56)

In January 1996, plaintiffs filed with the GAO timely administrative charges of unlawful age discrimination. (*Id.* ¶ 6) On March 6, 1997, the GAO issued a final decision denying plaintiffs' claims in their entirety. (*Id.* ¶ 7) That same day, the GAO informed plaintiffs by certified mail that if they wished to challenge that decision in federal court, they were required under the ADEA to file a complaint within 90 days, *i.e.*, by June 6, 1997. (*Id.* Ex. A at 2)

On June 2, 1997, Levy filed a complaint on her own behalf against the GAO alleging intentional age discrimination under the ADEA. *Levy* v. *United States Gen. Accounting Office*, No. 97 Civ. 4016 (S.D.N.Y. filed June 2,

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2. Citations to "Compl." refer to Levy's First Amended Complaint filed on September 18, 1997.

1997). On June 18, 1997, the Roemer plaintiffs filed a similar complaint against the GAO. *Roemer, et al.* v. *United States Gen. Accounting Office*, No. 97 Civ. 4488 (S.D.N.Y. filed June 18, 1997). After consolidating the two actions, I granted Levy's motion to amend her complaint pursuant to Rule 15(a) without prejudice to the GAO's right to challenge the Roemer plaintiffs' claims on the ground that those claims are time-barred.

On September 18, 1997, Levy amended her complaint adding the Roemer plaintiffs to her lawsuit.[3] The GAO moves to dismiss the Roemer plaintiffs' complaint in its entirety, and to dismiss them as additional plaintiffs from Levy's lawsuit, on the ground that the court lacks subject matter jurisdiction over the Roemer plaintiffs' claims pursuant to Rule 12(b)(1).

II.

First principles of sovereign immunity dictate that the United States cannot be sued without its consent. *See United States* v. *Mitchell*, 463 U.S. 206, 202 (1983). If the government has not waived its sovereign immunity, or if the conditions under which the government has agreed to waive that immunity have not been met, federal subject matter jurisdiction does not exist. *See United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *Williams* v. *United States*, 947

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3. Levy also amended the complaint to add a claim of disparate impact discrimination to supplement her initial allegation of intentional discrimination. Defendant does not challenge that this amendment relates back to Levy's original complaint. *See* Fed. R. Civ. P. 15(c)(2).

F.2d 37, 39 (2d Cir. 1991). In other words, a claimant may not sue the federal government without complying with all statutory and regulatory prerequisites. *See Morales* v. *United States*, 38 F.3d 659, 660 (2d Cir. 1994); *Wyler* v. *United States*, 725 F.2d 156, 159 (2d Cir. 1983).

The ADEA is a statute in which Congress has coupled a waiver of sovereign immunity with certain conditions precedent to suit in federal court. Under the ADEA, a federal employee claiming age discrimination has the option to sue in federal court in the first instance, or to pursue administrative remedies and then sue in federal court if he is dissatisfied with the results. *See* 29 U.S.C. § 633a(b) & (c) (1994); *Long* v. *Frank*, 22 F.3d 54, 56 (2d Cir. 1994). Where, as here, the employee chooses the latter course, he must satisfy two conditions before he may bring sue in federal court. First, he must file a charge of discrimination with the appropriate administrative agency within 300 days after the alleged discriminatory practice occurred. *See* 29 U.S.C. § 626(d) (1994); *Tolliver* v. *Xerox Corp.*, 918 F.2d 1052, 1054-55 (2d Cir. 1990). Second, he must file a complaint in federal court no later than 90 days after being notified of the agency's final decision on his claim. *See* 29 U.S.C. § 633a(d); 29 C.F.R. § 1613.514 (1998); *Wrenn* v. *Secretary, Dep't Veterans Affairs*, 918 F.2d 1073, 1078 (2d Cir. 1990); *see also* GAO Order 2713.2 at 23, ¶ 2(a) (1994).

It is the Roemer plaintiffs' failure to meet the second condition that is at issue here. The Roemer plaintiffs — unlike Levy — failed to file their complaint in federal court within the 90-day limitations period. The Roemer plaintiffs do not claim that they did not receive proper notice of the

GAO's final decision, or that the circumstances of this case require that the limitations period be equitably tolled. *Cf. Long*, 22 F.3d at 58-59; *Dillard* v. *Runyon*, 928 F. Supp. 1316, 1325 (S.D.N.Y. 1996), *aff'd*, 108 F.3d 1369 (2d Cir. 1997) (table).

Rather, they argue that their failure to sue within the limitations period is excused by the single filing rule. In the alternative, the Roemer plaintiffs contend that if their complaint must be dismissed, their claims against the GAO survive on the theory that Levy's First Amended Complaint — which now includes the Roemer plaintiffs' claims — relates back to Levy's timely complaint pursuant to Rule 15(c). I will consider these two arguments in turn.

A. *The Single Filing Rule*

The single filing rule provides that where one plaintiff has filed a timely charge of discrimination with the appropriate administrative agency, other non-filing plaintiffs may join in a later action in federal court if their individual claims arise out of similar discriminatory treatment in the same time frame. *See Snell* v. *Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986); *see, e.g., Baker* v. *National R.R. Passenger Corp.*, No. 94 Civ. 0856, 1994 WL 714279, at *4 (S.D.N.Y. Dec. 22, 1994). The rationale for this rule is to avoid needless repetition in the filing of administrative charges when the initial claim was sufficient to put the employer on notice of the alleged violations and afford the employer an opportunity for conciliation with the aggrieved employees. *See Snell*, 782 F.2d at 1100. In essence, the single filing rule — which has its origins in Title VII cases but

also applies to ADEA claims — excuses a plaintiff from meeting the first condition precedent described above, namely the filing of a timely charge of discrimination with the appropriate administrative agency. *See Tolliver*, 918 F.2d at 1057.

However, the Roemer plaintiffs cannot rely on the single filing rule to excuse their failure to file a timely complaint in federal court. As noted, the rule operates under certain circumstances to excuse a plaintiff's failure to file a timely administrative charge of discrimination. But failure to satisfy that condition is not what bars the Roemer plaintiffs' complaint here; in fact, it is undisputed that the Roemer plaintiffs filed timely charges of discrimination with the GAO. Rather, their complaint is time-barred because they failed to fulfill the second condition described above: filing suit in federal court within 90 days after being notified of the GAO's final decision on their claims.

In *Tolliver*, the Second Circuit specifically foreclosed the possibility that the single filing rule could operate to exempt a plaintiff from the requirement that he file suit in federal court within the limitations period. The Court wrote:

> Nor need we have concern that application of the single filing rule will oblige Xerox to defend against stale claims. The ADEA statute of limitations provides adequate assurance that stale claims will not remain viable. The charge filing requirement of section 7(d) sets a time limit, not for the purpose of limiting time for suit, but for the purpose of affording a prompt opportunity to

> attempt conciliation. That opportunity existed within the 300 days specified in section 7(d).

918 F.2d at 1059. Thus, although a plaintiff may use the single filing rule to piggyback on the timely administrative charge of another, he must still satisfy the second condition by filing suit in federal court within the limitations period established by the ADEA. *See Id.*; *Bowers* v. *Xerox Corp.*, Nos. 94-CV-6093T, 94-CV-6261T, 1995 WL 880773, at *4 (W.D.N.Y. May 5, 1995).

The single filing rule also does not apply to the Roemer plaintiffs because, as noted, they filed timely charges of discrimination with the GAO and were notified of that agency's final decision on their claims. The Fifth, Eighth, and Eleventh Circuit Courts of Appeals have each recently held that plaintiffs who actually filed administrative charges on their own behalf cannot use the single filing rule to evade the limitations period on filing ADEA actions in federal court. *See Gitlitz* v. *Compagnie Nationale Air France*, 129 F.3d 554, 557-58 (11th Cir. 1997); *Mooney* v. *Aramco Serv. Co.*, 54 F.3d 1207, 1224 n.22 (5th Cir. 1995); *Anderson* v. *Unisys Corp.*, 47 F.3d 302, 308-09 (8th Cir. 1995) ("Even if those plaintiffs are piggybacking on another employees timely administrative charge, once they file separate administrative charges, they cannot rely any further on the other claimant's actions and must timely file suit after receiving their right-to-sue letters.")

This result is required where, as here, the Roemer plaintiffs seek to recover money damages from the GAO, an agency of the United States government. As noted, federal

courts lack subject matter jurisdiction over claims against the United States where a plaintiff has failed to comply with all of the conditions precedent to bringing suit in the federal courts established by Congress. *See Morales*, 38 F.3d at 660; *Wyler*, 725 F.2d at 159. That the single filing rule permits a plaintiff — under certain circumstances and essentially for policy reasons — to piggyback his claim onto that of another even though he did not file a timely administrative charge does not mean that the United States has consented to be sued in court by that plaintiff after the limitations period has expired. To hold otherwise would be to enlarge the scope of Congress' waiver of sovereign immunity as that waiver is currently expressed in the limitations provisions of the ADEA. *See Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986) (waiver of sovereign immunity and any limiting conditions must be strictly construed); *Dillard*, 928 F. Supp. at 1322.

Nor do the Roemer plaintiffs cite any cases which require a different result. Although two cases from this District suggest a more expansive reading of the single filing rule, *see Connelly* v. *Manufacturers Hanover Trust Co.*, No. 89 Civ. 2257, 1990 WL 129186, at *3 (S.D.N.Y. Aug. 30, 1990); *Blesedell* v. *Mobil Oil Co.*, 708 F. Supp. 1408, 1413 (S.D.N.Y. 1989), both of these cases were decided before the Second Circuit clarified the limits of the single filing rule in *Tolliver*. The continued vitality of these cases is also questionable because their holdings conflict with the recent decisions of the Fifth, Eighth, and Eleventh Circuit Courts of Appeals discussed above.

To the extent that *Connelly* and *Blesedell* is still good law, both are distinguishable on the ground that neither

involved claims against the United States. Plaintiff cites no cases — and I am aware of none — standing for the proposition that the single filing rule can be used to circumvent the limitations period for bringing suit against an agency of the United States government. This omission is telling because, as noted, the Roemer plaintiffs' failure to file suit within the time established by the ADEA is more than just a violation of the statute of limitations; it bars this court from exercising jurisdiction over those claims because to do so would violate the immunity of the sovereign. *See Dillard*, 928 F. Supp. at 1324. Accordingly, the Roemer plaintiffs' complaint, 97 Civ. 4488, is dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

B. *Relation Back*

Rule 15(c) governs the relation back of amended pleadings to the original pleading for statute of limitations purposes. Rule 15(c) provides as follows:

> An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by the

> amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The Rule's purpose is "to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d 11, 19 (2d Cir. 1997) (citing Rule 15 Advisory Committee Note (1991)).

Because Levy's First Amended Complaint seeks to add the Roemer plaintiffs as additional parties to her lawsuit against the GAO, Rule 15(c)(3) governs whether that amendment relates back to Levy's original complaint. *See Advanced Magnetics*, 106 F.3d at 19 (Rule 15(c)(3) applies to addition of plaintiffs as well as defendants); *In re Integrated Resources Real Estate Ltd. Partnership Sec. Litig.*, 815 F. Supp. 620, 642 (S.D.N.Y. 1993). In order for an amendment which adds a new plaintiff to relate back to the original complaint, the original plaintiff must demonstrate: 1) the new plaintiff's claims arise out of the same transaction or occurrence advanced in the original pleading; 2) the defendant received adequate notice of the new plaintiff's claims so as not to be prejudiced in maintaining a defense on the merits; and 3) the defendant knew or should have known that, but for a mistake concerning the new plaintiff's identity, the action would have been brought on that party's behalf. *See* Fed. R. Civ. P. 15(c)(3);

Soto v. *Brooklyn Correctional Facility*, 80 F.3d 34, 35 (2d Cir. 1996); *Cornwell* v. *Robinson*, 23 F.3d 694, 705 (2d Cir. 1994).

Here, the GAO concedes that the first two elements of Rule 15(c)(3) are satisfied. (Def. Mem. at 25) However, the GAO argues that Levy's failure to name the Roemer plaintiffs in her original complaint was not the product of mistake, but rather a deliberate choice on her part to pursue her claims against the GAO in a separate action. Because mistake is a necessary element of relation back under Rule 15(c)(3), the GAO reasons that the Roemer plaintiffs' claims are untimely and must be dismissed for lack of subject matter jurisdiction. I agree.

Levy concedes that the failure to name the Roemer plaintiffs in the original complaint was not the result of mistake about the identity of other potential claimants. (Levy Mem. at 2) Levy argues instead that relation back may be permitted in the absence of mistake provided that the first two elements of Rule 15(c)(3) are satisfied. (*Id.* at 3-4) In the alternative, Levy and the Roemer plaintiffs contend that the "identity of interests" exception to Rule 15(c)(3) applies to this case. (*Id.* at 7-8; Roemer Mem. at 16-18) Neither argument is persuasive.

Levy's first argument is not viable: the Second Circuit has repeatedly held that mistake is a necessary element of relation back under Rule 15(c)(3). *See Soto*, 80 F.3d at 35; *Barrow* v. *Wethersfield Police Dep't*, 74 F.3d 1366, 1367 (2d Cir. 1996), *modifying*, 66 F.3d 466 (2d Cir. 1995); *Cornwell*, 23 F.3d at 705; *Gleason* v. *McBride*, 869 F.2d 688, 694 (2d Cir. 1989) and cases cited therein. Adhering to

these precedents, courts in this District routinely deny relation back where the element of mistake is not present. *See, e.g., Harris* v. *Butler*, No. 91 Civ. 6352, 1996 WL 403053, at *3 (S.D.N.Y. July 18, 1996); *Kahn* v. *Chase Manhattan Bank, N.A.*, No. 90 Civ. 2824, 1995 WL 491067, at *3 (S.D.N.Y. Aug. 17, 1995); *Adler* v. *Berg Harmon Assoc.*, 790 F. Supp. 1235, 1239 (S.D.N.Y. 1992); *Morin* v. *Trupin*, 778 F. Supp. 711, 735 (S.D.N.Y. 1991).

Apart from the express language of Rule 15(c)(3), which limits relation back to cases where "but for a mistake concerning the identity of the proper party" that party would have been named in the original complaint, mistake is a necessary element of Rule 15(c) because of the relationship between that rule and the statute of limitations. As the Second Circuit noted in *In re Allbrand Appliance & Television Co.*, 875 F.2d 1021, 1025 (2d Cir. 1989):

> [T]he relation back rule is intimately connected with the statute of limitations. It is designed to operate equably with that statute, to accommodate the statute of limitations policies that prevent stale claims from being litigated, and permit their repose. Clearly the relation back rule was not designed to provide a means to circumvent or expand the limitations period.

(quotations omitted). Similarly, as Judge Sweet aptly observed in *Morin*, "Rule 15(c) does not exist merely to keep the door open for any tardy plaintiff of whom a defendant may be aware. Rather, Rule 15(c) stands as a remedial device for adding or substituting a party who but for a *mistake* concerning the identity of the proper party would have been

named originally." (quotations omitted) (emphasis in original). Circumventing the 90-day limitations period for filing an ADEA action in federal court is precisely what the Roemer plaintiffs are seeking to do in this case. Because Levy concedes the absence of mistake, Rule 15(c)(3) does not permit the Roemer plaintiffs' claims to relate back to Levy's timely complaint.

Levy and the Roemer plaintiffs fare no better with their claim that the identity of interests exception to Rule 15(c)(3) applies here. "Under that exception, the institution of an action against one party will constitute imputed notice to a party subsequently named by an amendment of the pleading when the parties are closely related in their business activities or linked in their corporate structure." *Allbrand*, 875 F.2d at 1025. This exception does not apply here for two reasons.

First, as the passage quoted above makes plain, the identity of interests exception "impute[s] notice" to a closely-related party for the purpose of satisfying that element of Rule 15(c)(3). *Allbrand*, 875 F.2d at 1025. Thus, even if Levy and the Roemer plaintiffs shared an identity of interests — which they do not — the exception would not relieve Levy of the need to show mistake. *See West* v. *City of New York*, No. 88 Civ. 1801, 1995 WL 75475, at *2 (S.D.N.Y. Feb. 22, 1995). As noted, it is Levy's failure to show mistake — and not notice that bars relation back of the Roemer plaintiffs' claims.

Second, even if notice were at issue in this case, the Roemer plaintiffs are not sufficiently related to Levy to permit application of the identity of interests exception. The

Second Circuit has applied this doctrine only to parties having "substantial structural and corporate identity, such as shared organizers, officers, directors, and offices." *Allbrand*, 872 F.2d at 1025; *accord Gleason* v. *McBride*, 869 F.2d 688, 694 (2d Cir. 1989) (exception limited to the corporate context); *see, e.g., Hygrade Milk & Cream Co.* v. *Tropicana Products, Inc.*, 1993 WL 37496, at *1 (S.D.N.Y. Feb. 5, 1993) (wholly-owned subsidiaries of original plaintiff qualified for identity of interests exception). That Levy and the Roemer plaintiffs worked together at the GAO's New York office does not bring them within this exception, nor does it permit Levy to avoid the mistake requirement of Rule 15(c)(3). Accordingly, the Roemer plaintiffs' claims are dismissed from Levy's First Amended Complaint for lack of subject matter jurisdiction.

* * *

For the above reasons, defendant's motion to dismiss for lack of subject matter jurisdiction is granted, and the Roemer plaintiffs' claims are dismissed.

SO ORDERED:

s/ Michael B. Mukasey
Michael B. Mukasey
U.S. District Judge

Dated: New York, New York
April 20, 1998